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No. 79-1056

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC.

Petitioner,

v.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO,

AND

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND INTERNATIONAL UNION UAW AS AMICI CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND INTERNATIONAL UNION UAW FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), and the International Union UAW respectfully move this Court for leave to file the accompanying brief as *amici curiae* in support of the position of the respondents in this case.

INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States.

The International Union UAW, which represents approximately 1,250,000 employees, is the largest industrial union in this country.

The AFL-CIO and the UAW have a threefold interest in this matter.

First, the question of the extent to which the federal courts have authority to alter the express terms of statutory enforcement schemes either by implying causes of action or by creating "federal common law" is a recurring issue which touches many of the provisions regulating labor-management relations and internal union affairs. (See. e.g., *Universities Research, Inc.* v. *Coutu,* No. 78-1945.)

Second, as detailed in the brief *amicus curiae* filed in this case by the International Union of Electrical, Radio and Machine Workers, the labor movement has taken an active role in enforcing the employee rights specified in the Equal Pay Act and in Title VII of the Civil Rights Act of 1964. If in situations in which the violation grows out of a collective agreement, the employer can respond to such suits by suing the union seeking by litigation to eradicate the violation, we fear that the attendant financial risks will diminish this salutory means for ending discrimination.

Third, the right of contribution sought here would enable employers to impose liabilities on unions which have not had the benefit of the procedural protections stated in the Act, contrary to the clear intent of Congress.

ISSUES TO BE COVERED IN THE BRIEF AMICI CURIAE

The quesion raised in this case—whether a "federal common law right of contribution" should be recognized—does not depend, as Northwest Airlines would have it, solely on the merits of contribution as an equitable principle. For, Northwest's claim necessarily presents a more fundamental threshold question—whether, to use the illuminating

phrase in *United States* v. *Reliable Transfer,* 421 U.S. 397, 409, the federal courts have the authority "to take the lead" in providing, as a matter of federal common law, contribution to Equal Pay Act-Title VII judgment debtors or whether it is for Congress to take that lead by stating hat right in legislation, expressly or by implication. This latter point which we believe to be the essence of this matter is treated in relatively brief compass by the parties. The purpose of the attached brief *amici curiae* is to explore the ramifications of that separation-of-powers issue and to show that Northwest's invitation to create such a right must be refused because acceptance would require the Court to transgress well-established limits as to the lawmaking role of the federal judiciary.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amici curiae* should be granted.

Respectfully submitted

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AND INTERNATIONAL UNION UAW AS AMICI CURIAE

This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

ARGUMENT

In this case, Northwest Airlines seeks contribution from two unions toward Northwest's judgment liability in an Equal Pay Act-Title VII action brought by certain of the Company's employees and in which the unions were not

named as defendants and did not participate. Northwest "assert[s] a federal common law right of contribution • • •" (Northwest Br. 51).

The question whether a "federal common law right of contribution" should be recognized does not depend, as Northwest would have it, solely on the merits of contribution as an equitable principle—a matter in dispute which the Company oversimplifies (see p. 8, n. 3). For, Northwest's claim necessarily presents a more fundamental threshold question—whether, to use the illuminating phrase in *United States* v. *Reliable Transfer,* 421 U.S. 397, 409, the federal courts have the authority "to take the lead" in providing, as a matter of federal common law, contribution to Equal Pay Act-Title VII judgment debtors or whether it is for Congress to take that lead by stating that right in legislation, expressly or by implication. On the latter point, we see no conceptual difficulties. Northwest's invitation must be refused because acceptance would require the Court to transgress well-established limits as to the law-making role of the federal judiciary. Where, as here, the judicial authority to decide cases in a particular area derives wholly from Acts of Congress, the Court has recognized the overriding principle stated in Art. I § 1 of the Constitution—"All Legislative Power herein granted shall be vested in a Congress of the United States • • •".

1. At the outset Northwest strains to convince the Court that this matter is well within its traditional purview. The means to that end is the suggestion that to "place this case in perspective" it should be recognized that:

> • • • [T]his [is not] a case that requires the creation of implied rights of action to enforce federal statutes. Those rights already exist under the terms of the statutes and under other related doctrines. The simple

> issue is whether the Court agrees, as most lower courts have, that the developing law of remedies warrants recognition of a claim for equitable contribution among parties who already share legal and factual responsibility for a violation of federal employment discrimination laws. [Northwest Br., 11.]

Plainly this is an effort to gain momentum from cases such as *Sullivan* v. *Little Hunting Park,* 396 U.S. 229 (cited at Northwest Br. 12, n.5) which state that "the existence of a statutory right implies the existence of all necessary and appropriate remedies". But the concept of remedy cannot be stretched as far as the Company needs to stretch it. The framework for analysis is provided by *Davis* v. *Passman,* 442 U.S. 228. There the Court proceeded by first inquiring whether federal law "confers" on the claimant the "right" on which his claim rests. (See *id.* at 234-236.) Then the Court turned to the question of whether that right is judicially enforceable, stating:

> * * * [*J*]*urisdiction* is a question of whether a federal court has the power, under the Constitution or laws of the United States, to hear a case * * *; *standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy or at least to overcome prudential limitations on federal-court jurisdiction, * * *; *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court; and *relief* is a question of the various remedies a federal court may make available. [442 U.S. at 237-238, n.18. Emphasis in original; citations omitted.]

And the *Davis* Court pointed out: "[T]he question of whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." (*Id.* at 237.)

Thus, to reach remedy issues, the courts must first ascer-

tain whether there is a right of contribution.[1] While Northwest states that this "right already exists under the terms of the statutes and other related doctrines," the Company does not enlighten us as to where the "right" is to be found. So far as Northwest shows or we are aware, there is nothing in any statute granting rights to or imposing obligations on employers and unions *inter se* in situations such as that here. Rather, the Equal Pay Act and Title VII, the sources of Northwest's liability, and the duty of fair representation implied from the Railway Labor Act[2] to

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[1] This case does not present, and we therefore do not discuss, the complex of questions as to the proper allocation of liability between employers and unions where both parties are properly before a court. (Compare *Czosek* v. *O'Mara*, 397 U.S. 25, cited at Northwest Br. 33 which treats with this problem in a duty of fair representation—breach of contract context.)

[2] Northwest's reference to the duty of fair representation (Northwest Br. 32-33) is not only misleading, but self-defeating. It is misleading in that it seeks to convey the implication that where an employer has violated Title VII and the Equal Pay Act and there is a collective bargaining relationship with a union, the union has necessarily violated that duty. But where an employer violates those statutes, a union's failure to prevent an employer's violation does not necessarily entail a breach of the union's duty of fair representation, if, for example, the union lacked the bargaining power to alter the employer's conduct, or where the union believed in good faiht that the employer's conduct was lawful. On the other hand, there are instances in which a union may violate the duty of fair representation in which neither Title VII nor the Equal Pay Act are implicated at all. In short, Title VII and the Equal Pay Act on the one hand, and the duty of fair representation on the other, are not congruent, and cannot be lumped together as Northwest seeks to do.

Northwest's argument is self-defeating for three reasons:

First, and foremost, although the duty of fair representation has been described as an instance of "federal common law" (Northwest Br. 32), it is far from a judicial invention, as Mr. Chief Justice Stone made clear in the leading case, *Steele* v. *L. & N. R. Co.*, 323 U.S. 192, 202-203:

which the Company also adverts, go no further than to grant certain rights to *employees* and to impose corresponding obligations owing *employees* on employers and unions. And, the Company does not contend that any other source provides a basis for its contribution claim. Moreover, as its statement of position quoted above shows, Northwest disclaims reliance on the line of cases delineating the authority of the federal courts to "impl[y] rights of action to enforce federal statutes", the most recent of which is *Transamerica Mortgage Advisors* v. *Lewis,* 444 U.S. 11. Thus, here as in *United States* v. *Standard Oil Co.,* 332 U.S. 301, 302 this Court is importuned "to create a new substantive legal liability without legislative aid and as at common law".

2. The decisive consideration against that plea, in our view, is that absent Congressional action, the dispute between Northwest and its employees, and all the ramifications of that dispute, would not be governed by federal law. The federal courts have never asserted, and we do not believe that the judiciary could assert, an authority, absent statute, to create a law of fair employment practices in private industry. And, when federal judicial authority results from an Act of Congress, substantive

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We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them". [See also *id.* at 204: "It is the federal statute which condemns as unlawful the Brotherhood's conduct."]

Second, this is yet another example of Northwest's effort to seize upon a right created for the benefit of *employees* and transmute it into one for the benefit of employers.

Third, *Czosek* v. *O'Mara, supra,* cited by Northwest, provides for an apportionment of damages entirely different from the rule of contribution for which Northwest contends.

rights are either created by the statute or they do not exist. As the Chief Justice reminded in *TVA* v. *Hill*, 437 U.S. 153, 194-195:

> * * * Our system of government is, after all, a tripartite one, with each branch having certain defined functions delegated to it by the Constitution. While "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803), it is equally—and emphatically—the exclusive province of the Congress * * * to formulate legislative policies. * * * Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit as a committee of review, nor are we vested with the power of veto.
>
> * * *
>
> We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political branches.

The constitutional allocation of law-making authority stated in *TVA* v. *Hill* applies with full force where as here the federal courts are asked to supplement statutory rights and obligations by creating an additional common law right of contribution. Indeed, on three occasions, in other contexts in which the courts' law making powers are concededly broader than they are when the federal concern is generated by legislation regulating private parties, the Court has declined to create common law rights that would shift liabilities from the place Congress has left those liabilities.

The first of these is *Standard Oil, supra.* There the Government sought to recover from a tort-feasor who had negligently injured a soldier "the amounts expended for hospitalization and * * * pay, as for loss of * * * services".

(322 U.S. at 302.) The Court concluded that the tort-feasor is "not liable from the injuries inflicted upon the Government." (*id.* at 304), reasoning in part:

> We would not deny the Government's basic premise of the law's capacity for growth, or that it must include the creative work of judges. * * * But in the federal scheme our part in that work, and the part of the other federal courts, outside the constitutional area is more modest than that of state courts, particularly in the freedom to create new common-law liabilities, as *Erie R. Co.* v. *Tompkins* itself witnesses. See also *United States* v. *Hudson*, 7 Cranch 32.
>
> Moreover, as the Government recognizes for one phase of the argument but ignores for the other, we have not here simply a question of creating a new liability in the nature of a tort. For grounded though the agreement is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be established. * * *
>
> Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse. * * * [332 U.S. at 313-316; footnotes omitted.]

Following *Standard Oil's* lead, the Court in *United States* v. *Gilman*, 347 U.S. 507, refused to create a legal obligation in circumstances strikingly similar to those presented here. In *Gilman*, the Government sought a right to recover indemnity from a federal employee whose negligence had resulted in the Government's tort liability to a third party under the Federal Tort Claims Act. The Government argued "that the right of indemnity, though not expressly granted by the Tort Claims Act, is to be implied" (*id.* at 508). The Court disagreed:

> Here a complex of relations between federal agencies and their staffs is involved. Moreover, the claim now

> asserted, though the product of a law Congress passed, is a matter on which Congress has not taken a position. It presents questions of policy on which Congress has not spoken. The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. [347 U.S. at 511-513, footnote omitted.] [3]

The Court has also confronted contribution claims in developing the federal admiralty law. In *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U.S. 282, 284 the Court noted:

> Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases, but this Court has never expressly applied it to non-collision cases. Halcyon now urges us to extend it to non-collision cases * * *. [Footnote omitted.]

Rejecting that invitation, the Court reasoned:

> In the absence of legislation, courts exercising a common-law jurisdiction have generally held that they cannot on their own initiative create an enforceable right of contribution as between joint tortfeasors. * * * To some extent courts exercising jurisdiction in mari-

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[3] The complexities of the problem of contribution are at least as great as those which cautioned against judicial creation of new rights and obligations in *Gilman*. In fact, as the leading treatise in the field observes (on the very page cited at Northwest Br. 12), the terms of the statutes "which to a greater or lesser extent permit contribution among tortfeasors" differ significantly. (Prosser, Torts, 4th ed. 307.) That treatise continues: "The drafting has not been free from difficulty. Where there is so much variation in the terms of the statutes, and even in the decisions apart from them, little more can be done here to indicate some of the more important questions, and how they have been dealth with." (*Id.* at 307-308.) Dean Prosser discusses eight separate issues (*id.* at 308-310), each of which the courts would be called upon to decide without Congresional guidance if Northwest prevails in its call for a "federal common law of contribution".

time affairs have felt freer than common-law courts in fashioning rules, and we would feel free to do so here if wholly convinced that it would best serve the ends of justice.

We have concluded that it would be unwise to attempt to fashion new judicial rules of contribution and that the solution of this problem should await congressional action. Congress has already enacted much legislation in the area of maritime personal injuries. * * * Many groups of persons with varying interests are vitally concerned with the proper functioning and administration of all these Acts as an integrated whole. We think that legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. The legislative process is peculiarly adapted to determine which of the many possible solutions to this problem would be most beneficial in the long run. * * * Should a legislative inquiry convince Congress that a right to contribution among joint tortfeasors is desirable, there would still be much doubt as to whether application of the rule or the amount of contribution should be limited by the Harbor Workers' Act, or should be based on an equal division of damages, or should be relatively apportioned in accordance with the degree of fault of the parties.

In view of the foregoing, and because Congress while acting in the field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so. [342 U.S. at 285-287; Footnotes omitted.] [4]

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[4] Far from acknowledging, as *Halycon* recognized, that the creation of a right of contribution has in the vast majority of instances been a function of legislative rather than judicial action, Northwest seeks to convey the opposite impression: At almost the outset of its argument, the Company says: "[C]ourts today generally allow contribution under a variety of circumstances. Over the last five decades, 41 states and the District of Columbia has rejected the common law rule and have adopted contribution as a general principle of the law of remedies" (Northwest Br. 12). Thus used, the word "courts" is a verbal artifice which obscures the critical fact that the court have almost always done so in the course of implementing legislation. The very treatise cited by Northwest in the immediate preceding paragraph of its argument shows that what

Halcyon can fairly be read to stand for the proposition that even in admiralty the limits of the federal courts' authority to provide contribution is stated in the ancient rule applied in collision cases or for the narrower conclusion that the federal courts will not disturb the design of federal statutory schemes by adding contribution rights to the rights Congress has established.

In *Cooper Stevedoring Co.* v. *Kopke, Inc.*, 417 U.S. 106, 110-112, the Court endorsed the second of these possibilities, explaining:

> * * * Even though the common law of torts rejected a right of contribution among joint tortfeasors, the principle of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper. * * * Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales.
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> * * *
>
> Despite the occasional breadth of its dictum, our opinion in *Halcyon* should be read with this historical backdrop in mind. Viewed from this perspective, and taking into account the factual circumstances presented in that case, we think *Halcyon* stands for a more limited rule than the absolute bar against contribution in noncollision cases urged upon us by petitioner. * * * Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case.

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was said in *Halycon* is still true: "Over a period of more than a century, only nine American jurisdictions have come to the contrary conclusion, allowing contribution without legislation." (Prosser, Tort, 4th ed, 306.) *Judson* v. *Peoples Bank & Trust Co.*, 17 N.J. 67, 88, 110 A.2d 24, 34 (cited at Northwest Br. 12) is illustrative of the state court decisions allowing contribution following enactments creating that right by "the Legislature, the ultimate arbitor of public policy".

In contrast to the situation in *Halcyon*, that in *Cooper* did not touch an area in which Congress had legislated and the Court therefore concluded, "On the facts of this case, * * * no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors". (*Id.* at 113.) [5] *Edmonds* v. *Compagnie Generale Transatl.*, 433 U.S. 256, 271-273 underlines this distinction:

> Though we recently acknowledged the sound arguments supporting division of damages between parties before the court on the basis of their comparative fault, see *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), we are mindful that here we deal with an interface of statutory and judge-made law. In 1972 Congress aligned the rights and liabilities of stevedores, shipowners, and longshoremen in light of the rules of maritime law that it chose not to change. * * * By now changing what we have already established that Congress understood to be the law, and did not itself wish to modify, we might knock out of kilter this delicate balance. As our cases advise, we should stay our hand

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[5] The only case "[o]utside the admiralty context [wherein] this Court has approved contribution * * *" (Northwest Br. 14), *United States* v. *Yellow Cab Co.*, 340 U.S. 543, is far from a sanction of the type of federal judicial lawmaking Northwest proposes. The Court there construed the Federal Tort Claims Act, wherein the United States waived its sovereign immunity on *"any claim"* on account of certain wrongful acts or omission of federal employees, and which provided that the United States would be liable *"if a private person would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred"* (*id.* at 548 quoting from § 410(a) of the FTCA; emphasis in original). Following that directive, this Court "approved contribution" against the United States because such claims were allowed under the local law of the two places where the government employees' wrongful act or omission occurred. The Court most assuredly did not make its own evaluation and affirmatively "approve[] contribution" as a federal policy. The Court was not acting on its own to create a right of contribution, it was following Congress' instructions to apply state law.

> in these circumstances. *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S., at 112; *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S., at 285-286. [Footnote omitted.]

For reasons we discuss below, cases involving the rights and liabilities of the United States or invoking the admiralty jurisdiction are among those in which the federal courts' lawmaking power is particularly broad. Yet the foregoing decisions make it plain that even in these areas the Court has recognized that where "Congress, while acting in the field has stopped short of approving [a] rule of contribution * * * we think it would be inappropriate for us to do so". (*Halcyon*, 342 U.S. at 287.) Where the sole basis of federal jurisdiction is an Act of Congress, there is no justification for independent judicial action. On the contrary there is an even greater inhibition against the courts "preempt[ing] congressional action" (*TVA* v. *Hill*, 437 U.S. at 195).

3. The cases dealing with "the creation of implied rights of action to enforce federal statutes" (Northwest Br. 11), which the Company so carefully eschews, further reinforce that conclusion. The basic rule is stated in *Transamerica Mortgage Advisors, supra:*

> The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. * * * While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, * * * what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear. [444 U.S. at 15-16.]

As Mr. Justice Brennan pointed out in his concurring opinion in *Touche Ross & Co.* v. *Redington*, 442 U.S. 560,

579-580, this Court's precedents plainly preclude such an implication

> * * * [W]hen * * * a statute clearly does not "create a federal right in favor of the plaintiff" * * * when the plaintiff is not "one of the class for whose especial benefit the statute was enacted" * * * and when there is also in the legislative history no "indication of legislative intent, explicit or implicit . . . to create such a remedy" * * *. [Citations omitted.]

An employer seeking contribution toward an Equal Pay Act or Title VII judgment liability is not a member of the class for whose especial benefit the statutes were enacted. That preconditions to the implication of causes of action crystallizes an inherent limitation on the scope of the courts' authority to elaborate federal statutes. The rationale of *Texas & N.O. R. Co.* v. *Railway Clerks,* 281 U.S. 548, the seminal implied-cause-of-action case,[6] is:

> The definite prohibition which Congress inserted in the act * * * [and which] is the essential foundation of the statutory scheme * * * cannot * * * be overriden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated. * * * The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. Many rights are enforced for which no statutory penalties are provided. * * * In each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each. * * * The right is created and the remedy exists. *Marbury* v. *Madison,* 1 Cranch 137, 162, 163. [281 U.S. at 569-570.]

The conclusion that, unless Congress expresses a contrary intent, a legislative declaration of definite rights and obligations whose consequences are not specified is not merely precatory but rather imports an intent "that the customary

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[6] See *Davis* v. *Passman, supra,* 442 U.S. at 238-239; *Cannon* v. *University of Chicago,* U.S. 667, 732-733 (Powell, J., dissenting).

legal incidents [of that declaration] would follow" (*Transamerica*, 444 U.S. at 19) comports with the general understanding of the purpose of such declarations. That conclusion may therefore be taken to fairly "reconstitute the gamut of values current at the time when the words were uttered" (*Woodwork Manufacturers* v. *NLRB*, 386 U.S. 612, 620 (quoting L. Hand, J.).) That, of course, is precisely the obligation of the courts in interpreting Acts of Congress.

The proposition which Northwest advances, on the other hand, is that where Congress creates enforceable rights in one party against another, the courts may create an additional right of contribution in favor of the latter and against a third party. But that proposition derives no rational support from the animating principle of the implied cause of action cases—that, all other factors being equal, the circumstance that *Congress* has created a right implies that those who are to benefit from that right have a remedy.

There is, moreover, no indication in the legislative history of Title VII or the Equal Pay Act of an intent to create a right of contribution. The indications are, in fact, to the contrary. In *Cannon supra*, 441 U.S. at 699 the Court observed that "it is appropriate * * * to presume that Congress was thoroughly familiar with [this Court's leading decisions] and that it expected its enactment to be interpreted in conformity with them."

As we demonstrated above, those decisions, read most narrowly, make it plain that in accord with the common law, the right of contribution is not one of the "*customary* legal incidents" that follow from statutory enactments, and that it is for Congress to create contribution rights if and when the Legislature determines that such rights are warranted. Against that background we submit that only a

positive expression of an intent to provide for contribution is sufficient. There is no such expression.

A right of contribution in favor of an offending employer is also inconsistent with the remedial schemes of Title VII and the Equal Pay Act. Even a summary description of these statutes, and the underlying legislative materials, demonstrates how great a distortion of the legislative intent would result from granting Northwest contribution under either Title VII or the Equal Pay Act.[7]

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[7] In two basic respects a right of contribution is *inconsistent* "with the underlying purposes of the legislative scheme * * *" (*Cort* v. *Ash*, 422 U.S. 66, 78) of Title VII:

(i) *Conciliation.* "Under Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for non-judicial and non-adversary resolution of claims." (*Great American F.S.L.A.* v. *Novotny*, 442 U.S. 366, 372-373. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44.) The preferred procedure is for conciliation by the EEOC prior to suit, 42 U.S.C. § 2000e-5(b). Although the EEOC's failure to engage in conciliation efforts does not bar court action by the person aggrieved after 180 days, 42 U.S.C. § 2000(e)-5(f)(1), the statute gives the district court authority to stay the action for an additional period to provide another opportunity for conciliation prior to litigation. (*Id.*) Moreover, failure to name a defendant in an EEOC charge is an absolute bar to the imposition of liability, even though there may be joint culpability with a defendant who is charged. (E.g., *EEOC* v. *MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir.).) The clear Congressional policy of "an opportunity to settle disputes through conference, conciliation and persuasion before the aggrieved party was permitted to file a lawsuit," (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. at 44), would be subverted by the recognition of a right of contribution. Uncharged unions would be immune from liability to aggrieved employees—the class for whose benefit the statute was enacted—but would be exposed to liability to employers who violated the Act.

(ii) *Limitations.* Congress placed strict time limits on proceedings under the Act. A violation must be the subject of an EEOC charge within 180 days (or within 300 days in a state with an ap-

The approach suggested by Northwest whereby a party failing to satisfy the established standard for implying

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plicable state law), or is immune from legal challenge. (*United Air Lines, Inc.* v. *Evans,* 431 U.S. 553, 558; *Mohasco Corp.* v. *Silver,* ..... U.S. ....., 48 L.W. 4851.) Similarly, after a charge is timely filed, right to legal redress is lost if suit is not filed within ninety days of the receipt of a right to sue lttter from the EEOC. 42 U.S.C. § 2000e-5(f)(1). "By choosing what are obviously quite short deadlines, Congress clearly intended to encourage prompt processing of all charges of employment discrimination." (*Mohasco* v. *Silver, supra,* 48 L.W. at 4855.) If a right to contribution were recognized, "[t]he short and precise time limitations of Title VII would be grossly altered," (*Great American F.S.L.A.* v. *Novotny, supra,* 442 U.S. at 376). Again, an employer in violation of the Act would be treated more favorably than an aggrieved employee.

The Equal Pay Act 29 U.S.C. § 206(d), is an even less hospitable source for an implied right of contribution in favor of Northwest. For that Act by its plain terms evinces a Congressional judgement not even to grant employees, the statute's especial beneficiaries, a damage claim against unions.

The Equal Pay Act was enacted in 1963 as an integral component of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* whose enforcement provision (29 U.S.C. § 216) is comprised of a complex series of components providing for criminal proceedings, civil actions by the Government, and *employee* double pay actions against "any *employer* who violates" *inter alia* the equal pay provision. The legislative history of the Equal Pay Act detailed in Section II B 3 of Respondent ALPA's brief shows that Congress acted on the understanding that the only private damage suit permitted is an employee action against an employer. "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." (*Transamerica, supra,* 444 U.S. at 19.)

Nevertheless, the Company states "the legislative history of the Equal Pay Act persuasively demonstrates that Congress believed the courts would require unions to shoulder equal financial responsibility for their violations." (Northwest Br. 23.) The total support for this assertion from the 1963 reports and debates is first, the following:

causes of action is entitled to simply disclaim relianace on legislative intent and ask the Court to supplement the legislation through federal common law would render meaning-

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For instance, Representative O'Hara, a member of the subcommittee that had drafted the final bill, stressed that

> "if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, they would be subject to *all the penalties and all the enforcement provisions* provided under the Fair Labor Standards Act."

109 Cong. Rec. 9209 (1963) (emphasis added). [Northwest Br. 26.]

Rep. O'Hara's statement is no broader than the statute—it is plainly true that unions are subject to all the remedies "provided under the Fair Labor Standards Act." But it is equally true that the FLSA does not provide for employee damage suits or employer contribution suits against unions.

Then Northwest quotes (*id.*) 12 words from a floor statement by Rep. Thompson, which we set out in their context:

> Mr. Chairman, * * * The Secretary will only have specific regulatory authority for the enforcement and administration of this act, since it is in fact a part of the Fair Labor Standards Act * * * where there is a charge of discrimination no action can be taken by the Secretary if that discrimination persists, except following an action initiated by him, or it could be initiated by the employee or the employer in a Federal district court. [109 Cong. Rec. 9197.]

Plainly this passage is about Government enforcement in general. And while there is an interjection in that statement referring to some form of employer FLSA suit, the nature and source of which is left entirely vague, we do not believe this snippet, which is the totality of Northwest's showing, can possibly be considered to be a "persuasive demonstration" sufficient to overcome the Act's plain language.

Finally, Northwest relies on the legislative history of the 1962 predecessor to the Equal Pay Act, which, of course, failed of enactment. (Northwest Br. 22, 24-25.) But explanations of the earlier proposal, which was not to be part of the FLSA, and which had an entirely different enforcement scheme providing solely for suits by the Government, are not an accurate guide to the Equal Pay Act the 1963 Congress redrafted and enacted.

less the approach established in this Court's decisions.[8]

4. None of the foregoing is meant to assert that in a carefully delimited area where the Constitution, in terms, or by the very nature of the system of government created therein, grant the judiciary such authority, the courts do not possess, and have not properly exercised, substantial lawmaking power. This Court has, indeed, acted independently in these areas to develop and apply substantive legal rights and obligations. But, if we properly understand the implications of Art. I § 1, and, if we have read the cases correctly, those exercises in judicial lawmaking do not justify the creation of the contribution right sought here.

(a) Federal jurisdiction in admiralty and maritime cases rests on Art. III. § 2, Cl. 1 of the Constitution. That provision is intended to incorporate "the general system of maritime law" as it existed when the Constitution was adopted (*The Lottawanna,* 21 Wall. 558), and to:

> empower the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," *Crowell* v. *Benson*, 285 U.S. 22, 55, and to continue the development of this law within constitutional limits [subject however to] Congress [power] revise and supplement the maritime law within the limits of the Constitution. See *Crowell* v. *Benson, supra,* at 55. [*Romero* v. *International Term. Co.*, 358 U.S. 354, 360-361.]

Against this background, this Court has consistently acted on the understanding that the Constitution grants the judiciary the authority to "take the lead in formulating"

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[8] *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457, holds that where "Congress has indicated * * * the purpose to follow [the] course * * * [whereby the] federal courts * * * fashion federal law where federal rights are concerned" that course is open under the Constitution and the courts will carry out the Congressional directive. Thus that decision comports with our understanding of the proper relationship between Congress' lawmaking power and that of the courts.

maritime law. (*Reliable Transfer Co., supra,* 421 U.S. at 409. See also, e.g., *Moragne* v. *States Marine Lines,* 398 U.S. 375.)

(b) As the Court noted in *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 103 "there is a federal common law * * * [w]hen we deal with air and water in their ambient or interstate aspects". Plainly Art. III, § 2, Cl. 2 of the Constitution ("In all cases * * * in which a State shall be Party, the Supreme Court shall have original Jurisdiction") contemplates a large role for the courts in such matters. Moreover, as the Court stressed in *City of Milwaukee,* the judicial authority to adjudicate such disputes according to neutral federal principles is inherent in the plan of the Constitution:

> The leading air case is *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, where Georgia filed an original suit in this Court against a Tennessee company whose noxious gases were causing a wholesale destruction of forests, orchards, and crops in Georgia. The Court said:
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> > " * * *it is plain that some such demands must be recognized, if the grounds alleged are proved. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands of the ground of their still remaining *quasi*-sovereign interests; and the alternative to force is a suit in this court. *Missouri* v. *Illinois*, 180 U.S. 208, 241." 206 U.S., at 237.
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> When it comes to water pollution this Court * * * [in] *Missouri* v. *Illinois,* 200 U.S. 496, said, "It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi the controversy would be resolved by the more peaceful means of a suit in this court." [406 U.S. at 104, 106-107. (Footnote omitted).]

(c) Based on a similar understanding of the role of the judiciary in furthering the Constitutional plan, the Court

has fashioned federal law in cases involving foreign affairs and international relations. As Mr. Justice Harlan stated in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 425:

> However, we are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co.* v. *Tompkins.* Soon thereafter, Professor Philip C. Jessup, now a judge of the International Court of Justice, recognized the potential dangers were *Erie* extended to legal problems affecting international relation. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. [Footnote omitted.]

(d) In a line of cases commencing with *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 398, this Court has recognized private causes of action to enforce rights specifically guaranteed by the Constitution. And in *Davis* v. *Passman, supra,* the Court, recognizing "the question of who may enforce a statutory right is fundamentally different from the question of who may enforce a right that is protected by the Constitution", explained:

> The Constitution, * * * does not "partake of the prolixity of a legal code." *McCulloch* v. *Maryland,* 4 Wheat. 316, 407 (1819). It speaks instead with a majestic simplicity. One of "its important objections," *ibid.,* is the designation of rights. And in "its great outlines," *ibid,* the judiciary is clearly descernible as the primary means through which these rights may be enforced. * * *
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> At least in the absence of "a textually demonstrable constitutional commitment of [an] issue to a coordinate political department," *Baker* v. *Carr,* 369 U.S. 186, 217 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to become merely precatory, the class of those litigants who allege that their own con-

> stitutional rights have been violated and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights. [442 U.S. at 241-242.]

(e) Finally, *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, declares:

> This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs. As the Court explained in *Clearfield Trust Co.* v. *United States*, 318 U.S., at 366-367:
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> > "When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . The authority [to do so] had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws [of any State]. The duties imposed upon the United States and the rights acquired by it . . . find their roots in the same federal sources. In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards." (Citations and footnote omitted.)

Thus, *Clearfield Trust* and its progeny establish that it is inherent in the Constitutional scheme for establishing a working federal government that the rights and obligations of the United States in carrying out its Constituional powers be determined as a matter of federal law, and that, given the complexity and variety of the Government's affairs, this body of rules include federal common law. Even so, and faithful to its premise, *Clearfield Trust* does not sustain a lawmaking power in the federal courts where there is a dispute between private parties that grows out of government actions. (See *Miree* v. *DeKalb County*, 433 U.S. 25, 30-31.)

CONCLUSION

For the above reasons, that part of the judgment of the

Court of Appeals pertaining to contribution for Equal Pay Act liability should be affirmed; that part of the judgment pertaining to contribution for Title VII liability should be vacated, and remanded with directions to dismiss. Alternatively, the judgment of the Court of Appeals should be affirmed in its entirety.

Respectfully submitted.

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